

Decision 99-02-014 February 4, 1999

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the matter of the petition by Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 256(b) of the Telecommunications Act of 1996.

Application 98-11-024  
(Filed November 16, 1998)

Robert J. Mazique, Attorney at Law,  
for Pacific Bell, applicant.  
James M. Tobin, Attorney at Law, for Pac-West  
Telecomm, Inc., respondent.

**O P I N I O N**

**Summary**

Respondent's motion for dismissal is denied.

**Background**

Pacific Bell (Pacific or applicant) and Pac-West Telecomm, Inc. (Pac-West or respondent) entered into a Local Interconnection Agreement dated March 15, 1996. The 1996 Agreement was not negotiated or entered into pursuant to Section 252 of the Telecommunications Act of 1996 (Act). Rather, it was negotiated consistent with Commission guidance in Decision (D.) 95-12-056, submitted for Commission approval by advice letter, and approved pursuant to the terms of that decision.<sup>1</sup>

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<sup>1</sup> The 1996 Agreement was filed as Advice Letter No. 18115, dated March 19, 1996. The advice letter states that it was submitted pursuant to D.95-12-056. All amendments to the agreement, including Amendment No. 5 dated June 10, 1998, state that they were

*Footnote continued on next page*

By letter dated April 30, 1998, Pacific notified Pac-West that it was terminating the 1996 agreement effective June 30, 1998, and stated that it was "prepared to begin negotiations for a new Interconnection Agreement."<sup>2</sup> Pac-West responded on June 9, 1998, stating that it was "willing to have discussions with Pacific for a new Interconnection Agreement."<sup>3</sup> Pac-West's response also noted that it expected "Pacific Bell to provide Pac-West with the terms and conditions of a recommended agreement as well as copies of all other Facilities Based Interconnection Agreements and Resale Agreements."<sup>4</sup>

Pacific Bell provided Pac-West with the standard contract for interconnection agreements and with other agreements signed under the Act and filed with the Commission. Subsequently, Pac-West's lead negotiator, Warren Heffelfinger, discussed applicable dates for arbitration window, which were later confirmed by Mr. Heffelfinger's e-mail sent to Ms. Seaman on September 18, 1998.<sup>5</sup> Based on these exchanges the parties set up an arbitration window

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submitted pursuant to D.95-12-056. D.97-06-011 and D.97-09-126 both find that the 1996 Agreement was not approved pursuant to the Act, but pursuant to D.95-12-056.

<sup>2</sup> Exhibit A, Motion of Pac-West for Dismissal, dated December 3, 1998. As provided in Section VIII, either party could terminate the Agreement after the initial 2 year term, upon 60 days written notice to the other party. As provided in Section VIII, the agreement continued--and continues--without interruption until a new interconnection agreement becomes effective.

<sup>3</sup> Exhibit B, Motion of Pac-West for Dismissal, dated December 3, 1998.

<sup>4</sup> Id.

<sup>5</sup> Exhibit C, copy of e-mail sent by Mr. Heffelfinger to MS. Seaman, in which Mr. Heffelfinger wanted to "double check on timing" asking Ms. Seaman whether her dates concurred with his dates. Dates cited were: Nevada Bell: 9/16 to 10/11 and Pacific Bell: 10/22 to 11/16, the respective dates signifying the arbitration window for each case.

counting from the date of Pac-West's letter to Pacific Bell. Accordingly, as confirmed by Mr. Heffelfinger's e-mail, October 22, 1998 was 135 days from June 9, 1998, and November 16, 1998, was 160 days from June 9, 1998.

The negotiating parties began discussions regarding the new interconnection agreement on July 14, 1998. Having failed to reach a new agreement, on November 16, 1998, Pacific filed an application for arbitration pursuant to Section 252 of the Act.<sup>6</sup>

On December 3, 1998, respondent filed a motion for immediate dismissal. On December 11, 1998, applicant filed a response in opposition to the motion. Also on December 11, 1998, respondent filed a reply to applicant's response.

### **Positions of Parties**

Pac-West asserts that before an application for arbitration is made, the Act requires that a request for negotiation must be received by the incumbent local exchange carrier (ILEC). Pac-West claims no such request was made of Pacific (the ILEC) by Pac-West, and, therefore, Pacific cannot apply for mandatory arbitration under the Act, according to Pac-West. Moreover, Pac-West says even if its negotiations with Pacific are subject to the Act, Pacific's application was filed beyond the statutory deadline and must be dismissed. According to Pac-West, the arbitration window clock begins on the date of Pacific's letter to Pac-West, rather than its reply letter to Pacific in which it agreed to negotiations.

Pac-West asserts that Pacific's application is an attempt to force premature arbitration of issues that are pending before the Commission and the Federal Communications Commission in other proceedings. Such tactic should not be

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<sup>6</sup> The caption submitted by applicant contains a typographical error. Applicant sought arbitration pursuant to Section 252(b), not Section 256(b), of the Act.

permitted, according to Pac-West. Finally, upon dismissal of the application, Pac-West says Pacific should be ordered to comply with the Commission's rules in D.95-12-056 (63 CPUC2d 700).

Pacific does not refute that it invited Pac-West to the negotiation table when it terminated the original agreement; however, it asserts that Pac-West's written reply, agreement for negotiation, and its agreement on the "arbitration window" that would govern the negotiation under the Telecommunications Act establish that PacWest and Pacific were negotiating under the Act and that consequently Pacific is entitled to file a mandatory arbitration pursuant to Section 252 of the Act. Pacific provides an e-mail message from Mr. Heffelfinger confirming an agreement on an arbitration window and a sworn declaration from its lead negotiator, Ms. Lynda Seaman, that in the negotiation that followed discussions were held on the subject of potential arbitration issues that each party might raise in the arbitration.<sup>7</sup>

Pacific states that at no time did Pac-West suggest that it was not negotiating under the Act, and that the conduct of Pac-West's negotiators demonstrate Pac-West was negotiating under the Act. Pacific says that if, in fact, Pac-West never had any intent to reach an interconnection agreement with Pacific Bell under the Act, it should have informed Pacific Bell at the start of the negotiation. But having failed to do so, by the conduct of its negotiator, Pac-West led Pacific Bell to believe that Pac-West was interested in an interconnection agreement. Pacific seeks to have Pac-West estopped to contend otherwise.

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<sup>7</sup> Declaration of Lynda Seaman in Support of Pacific Bell's Opposition to The Motion of Pac-West Telecomm, Inc., For Immediate Dismissal of A.98-11-024. Page 2

Pacific cites Pac-West's Motion for Dismissal to show Pac-West does not want a new agreement, and that Pac-West is delaying implementation of a new agreement. Pacific asserts that the Commission encouraged ILECs to renegotiate interconnection agreements,<sup>8</sup> that Pacific is simply seeking to do that here, and that Pac-West's obstructionism should be rejected. Finally, Pacific says Pac-West agreed to voluntarily negotiate a new agreement and, once in negotiations, the Act allows either party to apply for arbitration. In reply, Pac-West says that Pacific points to no document stating agreement by Pac-West that the Act applied to the negotiations.

### **Discussion**

Pacific Bell seeks arbitration under the provisions of Section 252(b) of the Act. Section 252(b)(1) provides that:

"ARBITRATION.--During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiations under this section, the carrier or any other party to the negotiation may petition a State Commission to arbitrate any opened issues."

Pac-West states that Pacific "has not received any request for negotiation from Pac-West sufficient to commence negotiation under Section 252 of the Act, and that therefore no arbitration under Section 252 can be commenced." However, Pac-West does not deny sending a reply letter to Pacific expressing its willingness to engage in discussions with Pacific Bell for a new Interconnection

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<sup>8</sup> "Rather, the proper remedy would be for the termination charge to be negotiated between the parties to recognize the appropriate costs of call termination and in view of the corresponding revenues received by the carrier on whose network the call is originated. ILEC can renegotiate the interconnection agreements when they terminate to achieve this outcome." (D.98-10-057, mimeo., pages 18-19.)

Agreement. In the same correspondence Pac-West furthered the process of negotiation with Pacific by requesting specific documents that are relevant to an interconnection negotiation under the Telecommunication Act. Pac-West specifically asked for Pacific's "recommended agreement" and "all other Facilities Based Interconnection Agreements and Resale Agreements." Pacific's recommended agreement is the standard contract form, which the company uses for interconnection agreements governed by the Telecommunications Act.<sup>9</sup> The other Facilities Based Interconnection Agreements and Resale Agreements are agreements Pacific Bell has filed with this Commission pursuant to the Telecommunications Act.

During the earlier phase of the discussions, the lead negotiators, Hefflefinger from Pac-West, and Seaman from Pacific established a 25-day "arbitration window" dates of October 22, 1998, and November 16, 1998, as the 135th and 160th days, respectively, counting from June 9, 1998. Hefflefinger's e-mailed message in this regard is critical to our determination that as the prime negotiator for Pac-West, he confirmed the arbitration window that the parties had earlier agreed upon. Hefflefinger's counting of the arbitration dates start on June 9, 1998, the date on which he sent a letter to Pacific Bell accepting Pacific's invitation to negotiate and requesting materials pertinent to Interconnection Agreement, a list of dates for discussions, and offering Pac-West's Stockton's office to hold the negotiations. Through this series of actions of its lead negotiator, Hefflefinger, Pac-West had clearly led Pacific Bell to believe that Pac-

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<sup>9</sup> See Pacific Bell's Opposition To The Motion of Pac-West Telecomm, Inc., For Immediate Dismissal of A.98-11-024, page 3.

West was voluntarily agreeing to negotiate with Pacific for interconnection agreement.

Pac-West's active participation and agreement in setting the 135th and 160th day arbitration window is consistent with Section 252(b)(1) of the Telecommunications Act. According to Section 252(b)(1) the 25-day period is reserved for any of the parties to the negotiation to petition a State Commission to arbitrate any open issues. Heffefinger's e-mail is unambiguous in confirming these dates, and thus agreeing to allow either party to seek mandatory arbitration from the Commission during this inclusive period. Furthermore, in a sworn declaration, Ms. Seaman asserts that on July 14th on which the negotiation commenced, a discussion was held between the two parties regarding what potential arbitration issues each party might raise in the arbitration. Pac-West does not dispute this assertion. However, Mr. Heffefinger submits in a sworn declaration that he has "no particular expertise" with respect to telecommunications law or the applicability of federal law versus California to the negotiations for interconnection agreement between Pacific Bell and Pac-West.

We find Mr. Heffefinger's claim inconsistent with his involvement in interconnection agreement negotiations with Nevada Bell, an affiliate of Pacific Bell. In the Nevada case Pac-West, through Heffefinger's actions, had initiated interconnection negotiation with Pacific Bell.<sup>10</sup> In fact, in the e-mail Mr. Heffefinger sent to Pacific, Heffefinger makes no distinction between the

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<sup>10</sup> See Attachment A, Reply of Pac-West Telcomm Inc. To Pacific Bell's Opposition. In a letter dated April 24, 1998, Mr. Heffefinger requests to initiate interconnection negotiation with Nevada Bell for Pac-West and asks for, among other things, general negotiation procedure.

Nevada negotiation (whose initiation, as far as we know, has not been disputed by Pac-West) and the Pac-West/Pacific Bell negotiation. Heffelfinger used the same e-mail to confirm dates for arbitration for both cases.

Thus we cannot rely on his claimed ignorance of federal and state interconnection laws to grant the motion of Pac-West to dismiss Pacific's Application for mandatory arbitration. Having said that we find Pac-West's remaining assertions in its Motion for dismissal lacking in support and unconvincing.

Section 252(a)(1) provides that:

"VOLUNTARY NEGOTIATIONS.—Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251."

Clearly, this is not a cut and dry negotiation process. Pac-West did not, as a matter of fact, initiate the negotiation process. Pacific did that. However, both parties through their action assented to considering Pac-West's reply letter to Pacific as the de facto bona fide request for negotiation to begin interconnection negotiation. Both parties counted the arbitration window from the date of the letter sent by Pac-West, essentially establishing Pac-West's letter as the request for interconnection. Nothing before us shows that Pac-West at any time in this process disagreed with or expressed that it had any different understanding of the determination of the arbitration window. To the contrary, Pac-West sought from Pacific materials, which are relevant to Interconnection Agreements under the Telecommunication Act. It further agreed to an arbitration window during which each party may seek mandatory arbitration by the Commission on any open issues, and engaged in negotiation pursuant to these conditions. In view of



Pac-West's actions we can attribute no other credible purpose to Pac-West's negotiation with Pacific other than a negotiation process under Section 252 of the Telecommunications Act.

Pacific cites D.98-10-057 in support of its claim that it is only seeking to follow Commission guidance and renegotiate this interconnection agreement. Pacific is correct that the Commission stated ILECs can renegotiate interconnection agreements to rationalize termination charges. (D.98-10-057, mimeo., page 19.)

Respondent's motion should be denied. Applicant and respondent shall continue to engage in the arbitration proceeding before Arbitrator Burton W. Mattson.

### **Comments on Draft Decision**

The alternate draft decision of Commissioner Josiah L. Neepser on this matter was mailed to parties in accordance with PU Code § 311(g)(1) and Rule 77.6(e) of the Commission's Rules of Practice & Procedure.

Timely comments were filed by Pac-West and Pacific Bell. We have carefully reviewed the comments presented to us and made non-substantive changes to the decision as warranted.

### **Finding of Fact**

Pac-West through the actions of its lead negotiator had accepted its June 9, 1998 letter to be the start date for counting the 135th and 160th day for arbitration window under Section 252 of the Act and in so doing thus assented to considering its letter as a request for interconnection negotiation with Pacific Bell under Section 252 of the Act.

### **Conclusions of Law**

1. The Act provides that during the period from the 135<sup>th</sup> to the 160<sup>th</sup> day after the date on which an ILEC receives a request for negotiations under Section 252

of the Act, the carrier or any other party to the negotiation may petition the State Commission for arbitration of any open issue.

2. This order should be effective today so the parties may continue negotiations under the Telecommunications Act without delay.

**O R D E R**

**IT IS ORDERED** that the December 3, 1998 motion of Pac-West Telecomm, Inc. for immediate dismissal is denied.

This order is effective today.

Dated February 4, 1999, at San Francisco, California.

RICHARD A. BILAS  
President  
HENRY M. DUQUE  
JOSIAH L. NEPPER  
Commissioners

I will file a written concurrence.

/s/ HENRY M. DUQUE  
Commissioner

A.98-11-024  
D.99-02-014

Henry M. Duque, Commissioner, concurring:

I concur with the reasoning and result reached in this decision.

In addition to the reasoning cited in the decision, I wish to note that within the context of interconnection negotiations, all proceedings for some time have progressed towards resolution down the "federal" path chartered by the Telecommunications Act. Thus, without some affirmative action on Mr. Heffelfinger's part, his actions could only have one reasonable interpretation – that Pac-West, the company he represented, was entering into negotiations with Pacific under the procedures governed by the Federal Telecommunications Act.

For this additional reason, I concur with the result reached in Item 1a.

/s/ HENRY M. DUQUE

Henry M. Duque  
Commissioner

February 9, 1999

San Francisco